IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JACQUELINE EXUM-PETTY, BERNARD BUCKHALTER, THE COLUMBUS-LOWNDES CHAPTER OF THE NAACP, and the LOWNDES COUNTY VOTERS LEAGUE, FOR THEMSELVES AND THOSE SIMILARLY SITUATED,
Plaintiffs

V. NO. 1:92CV335-B-D

BAPTIST MEMORIAL HEALTH CARE SYSTEM, INC., DWIGHT COLSON, WALT WILLIS, and JOHNNY MACK McCRARY, individually and in their official capacities as elected members of the Board of Supervisors of Lowndes County, Miss., B. L. McBRIDE, JIMMY GALLOWAY, SAM KINDRED, and DAVID CURTIS, individually and in their official capacities as appointed members of the Board of Trustees for Golden Triangle Regional Medical Center, ADVENTIST HEALTH SYSTEM, COLUMBUS-LOWNDES HEALTH SERVICES, EPIC HEALTHCARE SERVICES, GOLDEN TRIANGLE HEALTH CORPORATION, ADVANCED RECOVERY, INC., CHARLIE FAULKNER, Administrator, GTRMC AND THE WILLOWBROOK FOUNDATION,
Defendants

MEMORANDUM OPINION

This cause is presently before the court on several motions. The defendant Baptist Memorial Health Care System, Inc. ("Baptist") moves for summary judgment. The defendants, Board of Supervisors of Lowndes County, Miss. ("Board"), Board of Trustees for Golden Triangle Regional Medical Center ("Trustees"), Charlie Faulkner, and the Willowbrook Foundation have all moved to dismiss the case or in the alternative they seek a summary judgment.[1] The

[1]The court does not appear to have personal jurisdiction over defendants Adventist Health System, Columbus-Lowndes Health Services, and Epic Healthcare Services, as no service of process has been returned or appearance made in their behalf. Therefore,

plaintiffs have before the court a motion to appeal the magistrates' denial of leave to amend the complaint as well as a motion for a continuance pursuant to Rule 56(f) of the Fed. R. Civ. P. Jurisdiction is allegedly based on 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, the First and Fourteenth Amendments to the United States Constitution, and Title VI of the Civil Rights Act of 1964. Having reviewed all pertinent documents to the motions at issue, the court now rules.

FACTS

In August 1992, the Board decided to sell or lease the county hospital know as the Golden Triangle Regional Medical Center ("hospital"). After eliciting proposals from interested organizations, the Board decided to negotiate a lease with Baptist.

In November 1992, the plaintiffs filed this action including sixteen causes of action against the participants in executing the lease as well as all the organizations competing for the bid. The claims, summarized, are as follows: Counts I and II allege that the lease to Baptist, because of a "racial discriminatory history," will result in discrimination against African-Americans and deny them equal access to the hospital facilities; Count III alleges the same resulting discrimination by Baptist based on religion; Count IV alleges a violation of the doctrine of separation of church and

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the court does not include these defendants in its ruling -- they are not parties to this action.

state by leasing public property to a religious group that has not "totally separated" the hospital corporation from the religious organization; Counts V, VI, and VII allege in conclusory fashion, without any attempt to assert particular facts, a conspiracy (a) to discriminate against African-Americans; (b) to discriminate against non-Southern Baptists; and (c) to violate the doctrine of separation of church and state; Count VIII alleges a violation of "Title VI of the Civil Rights Act of 1964" because of the alleged racially discriminatory policies of Baptist and because it had not totally separated the hospital from the church organization. The remainder of the claims allege violations of the Mississippi Constitution.

On January 22, 1993, the court after a hearing on the plaintiffs' motion for a temporary restraining order and/or preliminary injunction and/or permanent injunction denied the same, stating that the plaintiffs had not demonstrated any substantial likelihood of success as to their complaints of alleged racial and religious discrimination, and allowed the Board to execute the lease to Baptist.

I. APPEAL FROM MAGISTRATE'S ORDER

On April 22, 1993, defendant Golden Triangle Health Corporation ("GTHC"), filed a motion requesting leave to amend the complaint. The proposed amended complaint sought to delete The Lowndes County Voters League as a plaintiff; to realign GTHC as a

plaintiff, whose own previous request to be so realigned was denied by the court on January 22, 1993; and to add Baptist Memorial Hospital-Golden Triangle, Inc. ("BMH-GT") as a defendant. GTHC explained that the proposed amendments made no substantive changes in the allegations of the complaint. The plaintiffs never joined in or were a party to the motion to amend.

After consideration, Magistrate Judge Norman L. Gillespie entered an order on May 10, 1993, denying defendant GTHC's motion to amend. Defendant GTHC never appealed or objected to this order.

After being reassigned to Magistrate Judge Jerry A. Davis, the court, apparently unaware of the prior ruling, issued a second order on July 22, 1994, again denying the motion to amend. On August 1, 1994, the plaintiffs served the present motion pending before the court. The motion does not specify which order the plaintiffs are appealing but states the reasons for amendment are threefold:

1. BMH-GT is a necessary and proper party;

2. There is a question of law and fact common to all parties that will arise at trial; and

3. BMT-GT is a party in whose absence complete relief cannot be accorded among those already parties.

None of the current reasons for amendment were stated by the GTHC in their original motion to amend. Thus, the issues are raised for the first time on appeal.

The court finds that the magistrates' rulings were not "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); see

Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993). The magistrates' decisions were based in part on a previous ruling by this court denying the realignment requested by GTHC during the January 22, 1993 hearing. Furthermore, the magistrate was correct in pointing out that it is proper to disallow amendment of a complaint while a motion for summary judgment is pending. Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146 (5th Cir. 1990). Indeed, the plaintiffs have not even attempted to show what error the magistrates committed but, instead, raise new and different grounds for amendment than did GTHC in their original motion. Jordan v. Tapper, 143 F.R.D. 567, 571 (D.N.J. 1992) (failure to present arguments to magistrate constitutes waiver of appeal to district court); Anna Ready Mix, Inc. v. N.E. Pierson Const. Co., 747 F. Supp. 1299, 1303 (S.D. Ill. 1990) (requiring all arguments be raised before the magistrate in the first instance). Accordingly, the plaintiffs have not demonstrated that either magistrate's order was clearly erroneous or contrary to law.

II. STANDING

Defendants Board, Trustees, Charlie Faulkner, and the Willowbrook Foundation have all moved to dismiss this cause for, among other things, lack of standing.[2] Standing is a threshold issue that must be addressed before a determination on the merits

[2]The plaintiffs have not responded to these motions to dismiss or in the alternative for summary judgment.

can be made. In ruling on a motion to dismiss for lack of standing, the trial court must accept as true all material allegations of the complaint in favor of the complaining party. Warth v. Seldin, 422 U.S. 490, 501, 45 L. Ed. 2d 343 (1975). Because the court finds the above-referenced defendants' motion well taken, even in this most favorable light, the court includes defendant Baptist, as well as all remaining defendants, in its dismissal of this cause.

It is a firmly established principle of constitutional law that those who seek to invoke the power of federal courts must allege an actual case or controversy. Rohm & Hass Tex. v. Ortiz Bros. Insulation, 32 F.3d 205, 207-08 (5th Cir. 1994); O'Shea v. Littleton, 414 U.S. 488, 493, 38 L. Ed. 2d 674, 682 (1974). The O'Shea Court explained that plaintiffs "must allege some threatened or actual injury." Id. at 493. "There must be a personal stake in the outcome such as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Id. at 494 (internal quotation marks and citation omitted). Questions of injury to the general public, in the constitutional sense, are not to be resolved by the judiciary. Finch v. Mississippi State Medical Ass'n, Inc., 585 F.2d 765, 771 (5th Cir. 1978). The plaintiff must allege that he or she has "sustained or is immediately in danger of sustaining some direct injury."

O'Shea, 414 U.S at 494, 38 L. Ed. 2d at 682. Additionally, the injury must be "both real and immediate, not conjectural or hypothetical." Id. (internal quotation marks and citations omitted). Abstract injury is not enough. Id.

Although the Supreme Court has acknowledged that the concept of standing has not been definitely and consistently defined, it has made clear that certain principles are firmly established. In essence, to establish an Article III case or controversy, a litigant first must clearly demonstrate that he or she has suffered an "injury in fact." Warth, 422 U.S. at 501; Whitmore v. Arkansas, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 (1990).

The case sub judice does not rise to the level of an actual case or controversy as to invoke the powers of the federal judiciary. The plaintiffs have not even alleged that they have ever been discriminated against by Baptist, Lowndes County, or anyone. Indeed, the plaintiffs base their allegations on past history of purported discrimination and an apprehension of future discrimination by Baptist against African-Americans and non-Southern Baptists. This subjective apprehension is insufficient as a matter of law to satisfy the "injury in fact" requirement of standing. City of Los Angeles v. Lyons, 461 U.S. 95, 102, 75 L. Ed. 2d 675 (1983) ("[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehension") (emphasis in original).

Similarly, the allegations of past discrimination are insufficient to create an actual case or controversy. The Lyons Court noted that "past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." Id. at 103.

In Cone Corp. v. Florida Dep't of Transp., 921 F.2d 1190, 1205 (11th Cir.), cert. denied, 500 U.S. 942, 114 L. Ed. 2d 479 (1991), the Eleventh Circuit noted that a plaintiff demonstrates that he or she has met the standing requirements only if he or she "shows that the defendant is likely to injure the plaintiff." Cone dealt with a Florida statute that set aside a minority business participation program for contracts awarded by the state Secretary of Transportation. Id. at 1191. The plaintiffs, a group of caucasian-owned contracting firms, alleged racial discrimination in violation of the Fourteenth Amendment and, as a result, that they had been deprived of highway construction work. Id. at 1201. The court held that the plaintiffs had no standing since they had not alleged specific facts to support their allegations:

> They allege no facts, however, to support this allegation; that is, they did not point to any specific contract they lost because the Secretary discriminated against them on account of their race. In short, the plaintiffs' allegations of past racial discrimination at the hands of the Secretary are nothing more than bald conclusions. The plaintiffs' allegation of future injury suffered the same infirmity; the plaintiffs merely concluded that . . . "they will be injured in their business or property." This conclusory statement was the sole support for their prayer . . . .

Id. at 1205-06. Highly instructional was the court's statement that because the "plaintiffs provided the district court no facts . . . the court had to predict how the Secretary would probably treat the plaintiffs in the future if he followed the law, and thus whether the plaintiffs were entitled to the relief they sought." Id. at 1206-07.

Likewise, the court in the instant case would have to predict how Baptist would treat the plaintiffs without the benefit of any specific factual allegations to support the plaintiffs' claims. Indeed, they are nothing more than "bald conclusions." The plaintiffs simply have not alleged any injury specific to them or that they are in immediate danger of sustaining -- much less an injury in general. Thus, the plaintiffs have not distinguished themselves from the general public. See Finch, 585 F.2d at 771 ("litigant lacks standing to sue in federal court if he does not demonstrate that the actions complained of cause him injury in fact different from that suffered by citizens at large"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222, 41 L. Ed. 2d 706, 719 (1974) (holding questions of injury to the general public are not to be resolved by the judiciary). Therefore, the plaintiffs do not have standing to assert their claims.[3]

[3]Aside from the standing issue, the plaintiffs' complaint is facially invalid. Counts I, II, and III purport to allege racial and/or religious discrimination. The complaint contends that an alleged Baptist policy requiring that only Southern Baptists serve on the hospital boards has the "effect" of discrimination

Even if the plaintiffs demonstrated that they have standing to sue, they have not shown that the intent of the Board and the Trustees in executing the lease was motivated by any racial or

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and "impact[s]" African-Americans and non-Southern Baptists. The complaint, however, does not allege discriminatory intent or purpose -- an allegation which if missing is fatal to the complaint. Personnel Adm'r v. Feeney, 442 U.S. 256, 272, 60 L. Ed. 2d 870 (1979) (discriminatory impact must be traced to discriminatory purpose in order to constitute violation of the Constitution); Chavez v. Tempe Univ. High Sch. Dist. No. 213, 565 F.2d 1087, 1095 (9th Cir. 1977) (proof of discriminatory intent required even if there is an allegation of discriminatory impact); Flora v. Moore, 461 F. Supp. 1104, 1115-16 (N.D. Miss. 1978), aff'd without op., 631 F.2d 730 (5th Cir. 1980) (plaintiff "must show purposeful or intentional discrimination before casting upon a defendant the burden to rebut the charge"). Count IV is simply contrary to clearly established law on government involvement with church-based hospitals. The plaintiffs' allegation of the organizations not being "totally separated" is not the standard, is conclusory, and does not state a claim upon which relief can be granted. Counts V, VI and VII are wholly insufficient to satisfy the heightened pleading requirements of a conspiracy claim. Dayse v. Schuldt, 894 F.2d 170 (5th Cir. 1990) (conclusory allegations of conspiracy cannot, absent reference to material facts, constitute grounds for § 1983 relief); Arsenaux v. Roberts, 726 F.2d 1022 (5th Cir. 1982) (same); Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977), cert. denied, 434 U.S. 1077, 55 L. Ed. 2d 783 (1978) (same). Again, the plaintiffs allegations are merely bald conclusions completely devoid of any supporting factual references. Finally, Count VIII alleges a violation of Title VI of the Civil Rights Act of 1964. It is firmly established that a plaintiff must, at the very least, allege that he or she is an intended beneficiary of a "program or activity receiving Federal financial assistance" and that the alleged discrimination occurred in connection with the same. See Doe v. St. Joseph's Hospital, 788 F.2d 411, 418-420 (7th Cir. 1986); Flora, 461 F. Supp. at 1115. The plaintiffs have done neither.

religious animus or any desire to promote a religion or discriminate against any racial group.[4]

The Supreme Court has clearly indicated that transactions between government entities and religious institutions to provide health care are constitutionally permissible. Bradfield v. Roberts, 175 U.S. 291, 44 L. Ed. 168 (1899). At issue in

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[4]The plaintiffs did not respond to the substantive allegations in defendant Baptist's motion for summary judgment but, instead, moved for a 56(f) continuance in order to give the plaintiffs adequate time to conduct the discovery necessary to respond to the summary judgment motion. The court denies this motion as moot. Even if the court were to evaluate the motion on its merits, it would not change its position. To oppose a summary judgment under Rule 56(f), a party must file an affidavit explaining: (1) the information sought and how it is to be obtained; (2) how a genuine issue of material fact will be raised by that information; (3) what efforts the affiant has made to obtain the information; and (4) why those efforts were unsuccessful. See, e.g., S.E.C. v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980), cert. denied, 449 U.S. 1082, 66 L. Ed. 2d 806 (1981); First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 294, 20 L. Ed. 2d 569 (1968). All the plaintiffs have alleged in their affidavit is the need to depose individuals to establish the conspiracy to discriminate and give away public property. No mention of any of the other causes of action is made. Informative is the excuse given by the plaintiffs for their failure to obtain this information -- "I . . . have attempted t[o] obtain this information without going through the expense and time of taking depositions." The plaintiffs cannot be allowed to sit and wait for a motion for summary judgment before taking any action towards proving their allegations. Clearly, the plaintiffs have failed to establish any cause for the granting of such a motion. See Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1416 (9th Cir. 1987) (summary judgment will not be delayed for discovery on factual issues that the movant has already negated with affirmative evidence); Paul Kadair, Inc. v. Sony Corp., 694 F.2d 1017, 1030 (5th Cir. 1983) (noting that Rule 56(f) cannot be relied upon to defeat a motion for summary judgment "where the result of a continuance to obtain further information would be wholly speculative").

Bradfield, was a contract that allowed for the District of Columbia to pay for the construction of a new wing for a private hospital affiliated with the Catholic Church. Id. at 292. The Court noted that there was nothing in the articles of incorporation which mentioned the religion or faith of the incorporators and that it was "simply the ordinary case of the incorporation of the hospital for the purpose of which such an institution is generally conducted." Id. at 297. More significantly, the Court held that is was "wholly immaterial" that the hospital was alleged to be conducted under the auspices of the Catholic Church. Id. at 298. The Court explained:

> The facts stated above [noting the affiliation between the church and the hospital] do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics or all Methodist or Presbyterians or Unitarians . . . is of no consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. . . . That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. . . . [T]hose powers are to be exercised in favor of anyone seeking the ministrations of that kind of institution.

Id. at 298-99. Thus, the Bradfield case was a much stronger example of a government entity involving itself with a church-based hospital organization. It would follow then, that Lowndes

County's involvement with Baptist, merely leasing the hospital, is clearly free of any constitutional entanglements. See also Bowen v. Kendrick, 487 U.S. 589, 101 L. Ed. 2d 520 (1988) (following Bradfield, holding permissible, federal grants to non-profit private organizations for secular use).

The Fifth Circuit followed this reasoning in United States v. Crouch, 415 F.2d 425 (5th Cir. 1969). The court in Crouch stated that "a showing of mere ownership and control of the hospital by the Baptist Convention was insufficient to establish that the work performed by the hospital was of a religious nature." Id. at 429. In affirming the district court's decision, the Fifth Circuit explained:

> There is nothing in the record from which it may be inferred that the hospital staff members or employees or patients must be of the Baptist faith, nor is there any showing that the Baptist Religion is practiced in the hospital or that religious worship is imposed on its patients or employees.

Id. Similarly, there is no indication in the articles of incorporation, bylaws, or the lease agreement itself that any particular religion is required of the employees, the board members, or the patients.[5] Furthermore, there is no evidence that

[5]The plaintiffs object to certain statements made in affidavits filed by Baptist as hearsay or conclusory statements. It is not necessary to rule on these objections as the court does not base its findings on these statements. The court does, however, point out that the affidavit of Gregory M. Duckett indicates that he is an African-American and a non-Southern Baptist member of the Board of Directors at the BMH-GT -- the very hospital that allegedly discriminates against the same.

any particular religious faith is imposed on the same. These documents establish that the BMH-GT is a secular, non-profit organization, created for the purpose of operating a general, acute care hospital and related health services and not to promote the religious beliefs of the Southern Baptist Convention or discriminate on the basis thereof.

III. STATE LAW CLAIMS

The court, finding no remaining federal claims, dismisses the pendent state claims. United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218 (1966); see also Wong v. Stripling, 881 F.2d 200, 204 (5th Cir. 1989) ("[o]rdinarily, when the federal claims are dismissed before trial, the pendent state claims should be dismissed as well").

IV. CONCLUSION

For the foregoing reasons, the court dismisses the plaintiffs federal claims for lack of standing. The court also dismisses the plaintiffs pendent state claims without prejudice.

THIS the _____ day of May, 1995.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE